2. (Inhofe) Question - In its cost analysis for the 2002 rule, EPA argues that its change from "should" in the rule to "shall" does not constitute regulatory requirements and therefore had no cost impact on the proposal. EPA argued that 'should' always meant that the actions were requirements not recommendations. However, in a 1989 GAO report, EPA attorneys and program officials stated that they considered these provisions guidelines or recommendations – not requirements. Further in the Oil Spill Task Force's 1988 report one of its recommendations is that the "shoulds" be changed to "shalls" because "these changes to the regulations will require certain practices rather than only encouraging them." How do you account for the obvious discrepancy between statements of the attorneys working on the program in 1989 and the Agency's contention in 2002 that many of these provisions were always requirements? If in fact there was any doubt as to whether or not these provisions were required, should EPA have considered that uncertainty in the 2002 cost analysis?

Answer - EPA regulations have *always* since 1973 required that persons subject to the SPCC rule must have an SPCC plan that is certified by a Professional Engineer as adhering to good engineering practices. 40 CFR §112.3(a-d)(1973-2002); 40 CFR 40 CFR §112.3(a-d)(2003-2005). This requirement was unsuccessfully challenged in court by Mobil Oil by a motion to dismiss in an enforcement case in 1999:

> "Mobil also asks this court to dismiss the government's claim for violation of 40 C.F.R. § 112.7 because that section sets forth only discretionary 'guidelines' that 'should' be included in SPCC plans. . . .
>
> "The government explains that its claim is actually brought under § 112.3(b) which is a mandatory provision. It states that the owner or operator of an onshore facility 'shall' prepare an SPCC plan in accordance with § 112.7 and that each plan 'shall be a carefully thought out plan' which 'shall follow the sequence . . . and include a discussion of the facility's conformance with the appropriate guidelines.' Section 112.3(b). . . .
>
> "The defendants' motions to dismiss are therefore denied."

Order, *United States v. Texaco Exploration & Production, Inc., et al.,* Case Nos. 2:98-CV-0213S & 2:98-CV-0220S (D. Utah May 26, 1999)(enclosed). EPA understood, however, that the 1973 regulations' efforts to provide owners and operators with maximum discretion in meeting the ultimate requirements of Section 112.3 had unfortunately led a number of owners and operators to mistakenly view every spill prevention responsibility in Section 112.7 as voluntary. This was noted by the 1988 Report's finding that "Compliance with many aspects of the SPCC regulations is currently performed on a discretionary basis." This use of discretion was also reflected in Region III's 1989 statements relating to the enforceability of 40 CFR §112.7 relating to integrity testing and related requirements. Nevertheless, as the *Mobil* court understood in 1999, even discretion has its limits, and the limits imposed by the 1973 regulations were expressed in 40 CFR §112.3. Owners and operators, no matter how they handled many specific details, needed an SPCC plan that met the requirements of Part 112 by effectively preventing oil spills through the use of good engineering practices in all

relevant aspects.

In order to resolve this obvious misunderstanding, EPA made the "should" to "must" change in the 2002 SPCC regulatory changes, noting that "we have always interpreted and enforced our rules as mandatory requirements." 67 Federal Register 47052 (July 17, 2002). At the same time that EPA made this change, it also explicitly permitted Professional Engineers to make "environmental equivalence" demonstrations for all but secondary containment requirements 40 CFR §112.7(a)(2). Any owner or operator, before or after August 2002, could satisfy the ultimate requirements of 40 CFR §112.3 by either following the various listed relevant provisions of 40 CFR part112, or by adopting another "environmental equivalent" measure where allowed by the rule. There was no increase in regulatory burden by this 2002 change, *see* [ICR citation], only a more clearly written rule.